

**BEFORE THE COMMISSIONER
OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON**

In the Matter of:

Case Nos. **59-20**

**LEGACY MOUNT HOOD MEDICAL
CENTER,**

Respondent.

**INTERIM ORDER DENYING
RESPONDENT'S SECOND MOTION TO
COMPEL AND DENYING MOTION FOR
LEAVE TO FILE DISCOVERY MOTION
AFTER DISCOVERY MOTIONS DEADLINE**

INTRODUCTION

On November 2, 2022, the Respondent Legacy Mount Hood Medical Center ("Respondent") filed Respondent's Second Motion to Compel Discovery or in the Alternative Respondent's Motion for Leave to File Discovery Motion After Discovery Deadline. The Agency timely filed its response to the motion on November 14, 2022.

PROCEDURAL BACKGROUND

On December 21, 2021, the Agency filed a Notice of Intent to Assess Civil Penalties ("NOI") against Respondents Legacy Good Samaritan Hospital and Medical Center (Case No. 58-20), Legacy Mount Hood Medical Center (Case No. 59-20), Legacy Meridian Park Hospital dba Legacy Meridian Park Medical Center (Case No. 60-20), and Legacy Emanuel Hospital & Health Center dba Legacy Emanuel Medical Center (Case No. 61-20) concerning Respondents' alleged failure to provide appropriate meal and/or rest periods.

On January 4, 2022, Respondent filed its Answer to the NOI's in which Respondent denied the allegations set forth in the NOI and stated affirmatively the various actions taken in support of its denial that Respondent engaged in any willful

1 violations or should be assessed penalties. Respondent also set forth its affirmative
2 legal and factual defenses.

3 On or about April 29, 2022, Notices of Hearing were issued that set September
4 13, 2022, as the hearing date. On June 17, 2022, the forum issued the Interim Order
5 Granting Respondent's Motion to Postpone Hearings and Setting Deadlines for Filing
6 Case Summaries and Deadlines for filing Discovery Motions and Dispositive Motions
7 setting November 11, 2022, as the discovery motions deadline and November 21,
8 2022, as the motion response deadline.

9 On July 26, 2022, the Agency sent its initial discovery requests to Respondent's
10 attorneys via mail and email which consisted of 117 Requests for Production of
11 Documents ("RFPs") concerning Case Nos. 58-20, 59-20, 60-20, and/or 61-20. RFP
12 Nos. 1 through 39 each specifically referred to Respondent and/or Case No. 58-20.
13 (*Agency Motion to Compel*, Ex. 1, pp. 1-18). The Agency requested that Respondent
14 produce documents responsive to its RFPs within thirty days.
15

16 On September 19, 2022, the Agency filed a motion to compel discovery in each
17 of the four cases noted above. The Respondent timely filed its response on September
18 26, 2022. On October 4, 2022, the Forum issued the Interim Order Granting Agency's
19 Motion to Compel and Setting Production Deadline that required Respondent to
20 produce all remaining non-privileged documents responsive to the Agency's RFPs 1
21 through 6; 8 through 16; and 18 through 117 no later than October 28, 2022.

22 On October 11, 2022, Respondent filed its first Motion to Compel seeking
23 production of non-privileged documents the Agency had refused to produce. The
24
25

1 Agency filed its Response and Opposition to Respondent's Motion to Compel on
2 October 21, 2022.

3 On October 31, 2022, the Forum issued an Interim Order Granting in Part and
4 Denying in Part Respondent's Motion to Compel Discovery granting Respondent's
5 unopposed motion for a date certain, November 4, 2022, to produce remaining non-
6 privileged documents consistent with its responses and objections, which were not
7 challenged by Respondent, to RFP Nos. 1-38. The Interim Order denied Respondent's
8 motion to compel production of discovery responsive to its RFP Nos. 41-45, 50-51, 54-
9 61, 65-67, and 69-75. The Interim Order also denied Respondent's request that the
10 Agency organize its discovery responses to ease its review of the documents produced.

11 On October 25, 2022, Respondent served its Third Request for Production of
12 Documents on the Agency. Respondent's RFP Nos. 48-52, 57-68, and 72-82 are
13 similar in content to RFP Nos. 41-45, 50-61, and 65-75, which Legacy Good Samaritan
14 Hospital and Medical Center served in Case No. 58-20.

15 On October 3, 2022, the Agency in Case No. 58-20 declined to produce any
16 documents in response to these RFPs, stating, among other things, that the requests
17 seek information that is not "generally relevant" and/or that the Agency notes that it is
18 unaware of any employee(s) referenced in the NOI Case No. 58-20 being parties to a
19 collective bargaining agreement which prescribes rules concerning meal periods and
20 rest periods during the time periods referenced in the NOI.

21 On November 2, 2022, Respondent filed its Second Motion to Compel Discovery
22 or in the Alternative Respondent's Motion for Leave to File Discovery Motion After
23 Discovery Motions Deadline. Respondent's motion noted:
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1 “This motion contains additional supporting arguments not previously
2 reviewed by the Forum including discussion of opinions of the Oregon
Supreme Court and the Ninth Circuit Court of Appeals recently published
in 2022.”

3 Respondent’s motion seeks an order compelling the Agency to produce
4 documents in response to its RFP Nos. 48-52, 57-68, and 72-82 (Case No. 59-20); RFP
5 Nos. 46-50, 55-66, and 70-80 (Case No. 60-20); and RFP Nos. 41-45, 50-61, and 65-75
6 (Case No. 61-20). The RFPs addressed in Respondent’s motion are the same or
7 similar as those subject to the forum’s Interim Order Granting in Part and Denying in
8 Part Respondent’s Motion to Compel Discovery issued on October 31, 2022.
9

10 On November 14, 2022, the Agency timely filed its response to Respondent’s
11 motion to compel.

12 **DISCUSSION**

13 OAR 839-050-0200(1) provides:

14 “The Administrative Law Judge has the sole discretion to order discovery
15 by a participant in appropriate cases. This rule does not require the
16 Administrative Law Judge to authorize any discovery. If the Administrative
17 Law Judge does authorize discovery, the Administrative Law Judge will
18 control the methods, timing, and extent of discovery, but nothing in this
19 rule prevents informal exchanges of information. When the Administrative
Law Judge orders discovery, the Administrative Law Judge will notify the
participants of the possible sanction, pursuant to section (11) of this rule,
for failure to provide the discovery ordered.”

20 In a BOLI contested case proceeding, “[a]ny discovery request must be
21 reasonably likely to produce information that is generally relevant to the case.” OAR
22 839-050- 0200(7).

23 “[A] request for a discovery order must be filed with the Contested Case
24 Coordinator, be in writing, and must include a description of the attempts to obtain the
25

1 requested discovery informally. The Administrative Law Judge will consider any
2 objections by the participant from whom discovery is sought.” OAR 839-050-0200(5).

3 Pursuant to OAR 839-050-0200(8), the Administrative Law Judge will issue an
4 order granting or denying a discovery request in whole or in part. Participants must
5 comply with such orders and have a continuing obligation, through the close of the
6 hearing, to provide the other participants with any newly discovered material that is
7 within the scope of the discovery order.

8 OAR 839-050-0200(11) provides:

9 “The Administrative Law Judge may refuse to admit evidence that has not
10 been disclosed in response to a discovery order or subpoena, unless the
11 participant that failed to provide discovery shows good cause for having
12 failed to do so or unless excluding the evidence would violate the duty to
13 conduct a full and fair inquiry under ORS 183.417(8). If the Administrative
14 Law Judge admits evidence that was not disclosed as ordered or
15 subpoenaed, the Administrative Law Judge may grant a continuance to
16 allow an opportunity for the other participant(s) to respond.”

17 In addition to its previous arguments that its discovery requests seek relevant
18 evidence or evidence that is reasonably likely to lead to the discovery of relevant
19 evidence, Respondent directs the forum’s attention to the recent ruling of the Oregon
20 Supreme Court’s in *Scott v. Kesslerling*, 370 Or 1, 513 P3d 51 (2022). Specifically,
21 Respondent points to the following language:

22 “Relevant evidence is evidence that has ‘any tendency to make the
23 existence of any fact that is of consequence **to the determination of the**
24 **action more probable or less probable** than it would be without the
25 evidence.’ OEC 401.

* * * * *

... the fact that evidence may make it more likely that a jury will decide for
or against a party does not determine whether evidence is “unfairly”
prejudicial. See *Mccathern v. Toyota Motor Corp.*, 332 Or 59, 71, 23 P3d
320 (2001) (explaining that ‘relevant evidence often has the effect of
proving one party’s position while harming the other’s’). When a

1 defendant's conduct is at issue, there is nothing particularly unfair about
2 painting that conduct in all its details, and it could be unfair not to do so.
3 *Cf. State v. Davis*, 336 Or 19, 34, 77 P3d 1111 (2003) (concluding that
4 evidence was improperly excluded as prejudicial when it 'potentially was
5 influential because it tended to complete the picture of defendant's version
6 of the events and [d]efendant was entitled to prove his theory of the case
7 by presenting relevant, admissible evidence to the jury'. (370 Or at 24)
8 (emphasis supplied)."

9 (Resp. Second Mot. to Comp., p. 2)(emphasis added)

10 In *Kesselring*, a personal injury case, the court considered whether the trial court
11 erred in allowing evidence that the defendant used her cell phone immediately prior to
12 rear-ending the plaintiff's vehicle. The plaintiff claimed her emotional injuries that
13 resulted from the collision were so severe that she attempted to take her own life and
14 was hospitalized. The defendant argued that her conduct did not unreasonably create a
15 foreseeable risk of harm of the nature claimed by the plaintiff. The defendant argued
16 that, based upon her admission of fault, evidence regarding her cell phone use was
17 irrelevant as to any issue in the case and admission of such evidence was unfairly
18 prejudicial.

19 The court found that the defendant had put her conduct at issue by contesting
20 foreseeability. The court noted that the defendant had not argued that her conduct was
21 not the cause in fact of plaintiff's later mental health struggles. Rather, the defendant
22 contested the foreseeability of the plaintiff's later mental health struggles, thereby,
23 putting her own conduct at issue.

24 Respondent contends that the Oregon Supreme Court, in discussing "relevant
25 evidence," emphasized that the defendant was entitled to provide its theory of the case.
Respondent contrasts the Oregon Supreme Court's ruling in *Kesselring* with *Spray v.*
Board of Medical Examiners, 50 Or App 311, 330-31 (1981) and *Gregg v. Oregon*

1 *Racing Comm’n*, 38 Or App 19, 26 (1979). Respondent contends that, unlike the
 2 parties in both *Spray* and *Gregg* whose discovery requests were denied, it has clearly
 3 stated that its discovery requests are directly related to its defenses and are, therefore,
 4 properly within the scope of discovery. The Agency argues that *Spray* and *Gregg* stand
 5 for the principle that a party does not have the right to access all of the records in
 6 possession of the opposing party and that a party must only produce discovery that is
 7 generally relevant and necessary to the case or likely to facilitate resolution of the case.

8 **RESPONDENT’S AFFIRMATIVE DEFENSES**

9 The affirmative defenses noted in Respondent’s second motion to compel
 10 production of discovery include:

11 “41. **(Failure to Apply Rules Universally)** The Agency’s allegation that
 12 delayed meal periods are harmful is arbitrary and capricious in that the
 13 Agency permits other employers to establish variations from the rules,
 14 including employers whose employees are governed by collective
 bargaining agreements. A per se rule that is not universally applied is
 arbitrary and capricious.

15 * * * * *

16 “53. **(Arbitrary and Capricious Rulemaking Should Be Denied**
 17 **Enforcement)** The Agency entered into rulemaking knowing that acute
 18 medical providers, regardless of union or nonunion status, had critical
 19 difficulties managing rest and meal periods without compromising patient
 20 health and deliberately introduced a timing window applicable only to
 nonunion facilities with the knowledge that such requirements were
 contrary to the health and welfare of the applicable employees. Such rules
 are arbitrary and capricious as written and as applied.

21 * * * * *

22 “71. **(Agency Interpretation Without Rulemaking)** The Agency may not
 23 rely upon Agency interpretations that are not the result of formal notice-
 24 and-comment rulemaking. To do so is a violation of Oregon’s
 Administrative Procedures Act.

25 * * * * *

1 **“95. (Agency Failed to Consider Statutory Citation or Legal Basis for**
 2 **the Rule)** The Agency’s application of OAR 839-020-0050 is required to
 3 be “necessary for the preservation of the health of employees.” The
 4 Agency cannot meet this standard and consequently has exceeded its
 statutory grant of authority; its actions conflict with the stated policy goals
 of ORS 653.261.”

5 **RESPONDENT’S DISCOVERY REQUESTS**

6 Respondent’s discovery requests generally cover seven broad categories, each
 7 of which are addressed below.

8 *a. The Agency’s Treatment of Union Employers and Non-Union Employers*

9 Respondent contends that the Agency applies a double standard regarding meal
 10 and rest breaks in its treatment of employers with a Collective Bargaining Agreement
 11 (“CBA”) versus its treatment of those employers, such as Respondent, who do not have
 12 a CBA in place. The RFPs at issue include:

14 “RFP No. 46 seeks documents and communications relating to guidelines
 15 or analysis relating to the health and/or safety issues applicable to
 hospitals or health facilities of CBA employers.

16 RFP No. 47 seeks documents regarding the Agency’s investigation,
 17 issuance of notices of violation, or issuance of NOIs for meal period
 violations and/or rest period violations of CBA employers.

18 RFP No. 49 seeks memos, internal discussions, guidelines, or analysis of
 19 collectively bargained meal times at CBA employers.

20 RFP No. 56 seeks BOLI records or guidelines instructing BOLI staff not to
 investigate CBA employers.

21 RFP No. 59 seeks documents showing whether civil penalties, if any, have
 22 been assessed against CBA employers.

23 RFP No. 60 seeks NOIs, if any, that have been directed by BOLI against
 24 CBA employers.

25 RFP No. 70 seeks copies of forms and writings used by BOLI to ask
 complainants if they are employed by CBA employers.

1 RFP No. 71 seeks all forms and writings used by BOLI to ask
2 complainants if they are members of a union that represents them in
connection with their current employment.

3 RFP No. 72 seeks documents in which BOLI states that it does not accept
4 complaints for meal period or rest period violations with respect to CBA
employers.”

5
6 (*Resp. Second Mot. to Compel*, pp. 6-7)

7 The forum is not persuaded that information pertaining to other employers with
8 CBA’s is relevant to the case at hand or is likely to lead to the production of relevant
9 evidence. Respondent cites *Emerald Steel Fabricators, Inc. v. Bureau of Labor and*
10 *Indus.*, 348 Or. 159, 230 P3d 518 (2010) in support its argument that such evidence is
11 necessary to present a full and complete record to the forum and to preserve issues for
12 later review. However, *Emerald Steel* does not address discovery issues but, rather,
13 the preservation of issues for appeal. Respondent has failed to show how the
14 information sought in its RFP Nos. 46, 47, 49, 56, 59, 60, 70, 71, and 72 is relevant to
15 the issues before the forum. Therefore, Respondent’s second motion to compel
16 production of discovery response to RFP Nos. RFP’s 46, 47, 49, 56, 59, 60, 70, 71, and
17 72 is **DENIED**.

18
19 *b. Documents Regarding NOI’s Alleging Violations by Non-Union Hospitals*

20 Respondent’s RFP No. 48 seeks:

21 “**REQUEST NO. 48:** For the period 2017 to the present, all documents
22 which record, reflect, or memorialize that the Agency has issued NOIs for
meal period violations and/or rest period violations to non-union hospitals
23 or health care facilities for which employees are not covered by collective
bargaining agreements other than Legacy hospitals and Legacy health
care institutions.”

24 (*Resp. Second Mot. to Compel*, p. 9)
25

Respondent argues that the discovery sought relates to its defense that the Agency has selectively targeted Respondent for investigation, alleged violations and assessment of fines. *Id.* Respondent cites *Willowbrook v. Olech*, 528 US 562, 120 S. Ct. 1073, 145 L.Ed. 2d 1060 (2000), in which the Supreme Court held that a village's demand for a 33-foot easement from a homeowner when it had only required a 15-foot easement from similarly situated homeowners violated the Equal Protection Clause of the Fourteenth Amendment.

Respondent has not shown how the treatment of other non-union employers is in any way relevant to the issue of whether it committed the violations set forth in the NOI. Mindful of Respondent's defenses set forth above, the forum reminds the parties that the focus of the hearing will be on the allegations set forth in the NOI. The Agency will be held to its burden of proof, and the Respondent will be allowed to present relevant evidence in its defense. Neither party will be allowed to expand the scope of the hearing to address non-relevant issues. As there has been no showing that the Agency's treatment of non-union employers is relevant to the issue presently before the forum, the Respondent's second motion to compel production of discovery responsive to RFP No. 48 is **DENIED**.

c. Documents Pertaining to the Agency's Adoption of OAR 839-020-0050(7)

Respondent's RFP No. 55 seeks:

"REQUEST NO. 55: All documents that show, demonstrate, or reveal what led the Agency to adopt the provisions of OAR 839-020-0050(7) and how the Agency has administered OAR 839-020-0050(7) which provides:

"(7) The provisions of this rule regarding meal periods and rest periods may be modified by the terms of a collective bargaining agreement if the provisions of the collective bargaining agreement

entered into by the employees specifically prescribe rules concerning meal periods and rest periods.”

“Including the following:

- a. Documents received by or considered by the Agency from employer associations, labor organizations employers or employees urging the adoption of OAR 839-020-0050(7) allowing that the provisions of the rules regarding meal periods and rest periods may be modified by the terms of a collective bargaining agreement;
- b. Documents of the Agency supporting the adoption of a rule permitting modification of provisions regarding meal periods and rest periods by the terms of the collective bargaining agreement;
- c. Administrative drafts and input from Agency administrative staff leading to the adoption of OAR 839-020-0050(7);
- d. Documents in the Agency’s possession construing, interpreting or applying OAR 839-020-0050(7);
- e. Minutes of the Wage and Hour Commission records related to OAR 839-020-0050(7);
- f. Records of transfer of any minutes of the Wage and Hour Commission to State Archives;
- g. Hearing audio or video tapes or transcription of those audios or videos with respect to OAR 839-020-0050(7);
- h. All other administrative rule records regarding OAR 839-020-0050(7).

“This request is limited solely to OAR 839-020-0050(7) and is not related to any other subsections of OAR 839-020-0050.

“REQUEST NO. 62: All documents and communications, tape recordings, writings, or records to which former BOLI Commissioner Jack Roberts referred to during a March 21, 2001 hearing before the Oregon Senate Business, Labor and Economic Development Committee discussing a bill that was eventually enacted as ORS 653.261(3) in which Commissioner Roberts disclosed in testimony that he had contacted legal counsel at the Attorney General’s (AG’s) office regarding the fact that the proposed bill would provide flexibility to employers governed by collective bargaining agreements to schedule meal periods and breaks but that a similar flexibility would not apply to non-union employers and Commission Roberts’ public disclosure that the AG’s office had the belief that the National Labor Relations Act preempted that field and that if their interpretation of federal law was correct then the bill would not be valid.”

(*Resp. Second Mot. to Comp.*, pp. 11-12)(footnotes omitted)

1 Respondent contends OAR 839-020-0050 provides for more favorable treatment
2 of employers covered by a CBA as compared to the treatment of employers without a
3 CBA. Respondent argues that it is therefore entitled to documents pertaining to the
4 adoption of OAR 839-020-0050. The forum is not persuaded that the discovery sought
5 is relevant or is likely to lead to the discovery of evidence relevant to the issues before
6 the forum. Similarly, the forum is not persuaded that communications by a previous
7 Commissioner pertaining to a rule that was adopted by the Agency several years ago is
8 relevant to the issues presently before the forum. Therefore, Respondent's second
9 motion to compel production of discovery response to RFP Nos. 55 and 62 is **DENIED**.
10

11 *d. Calendar Entries of BOLI's Commissioner and Deputy Commissioner*

12 Respondent seeks documents related to calendar entries for the period of 2019
13 to the present for the current BOLI Commissioner and Deputy Commissioner that relate
14 to Respondent or other Legacy hospitals and health care institutions. (Resp. RFP's No.
15 59 and 60). Respondent argues that the discovery sought is relevant to the issue of
16 whether the Agency has improperly sought to impose large fines against the
17 Respondent and whether the Commissioner has thus failed to consider mitigating
18 circumstances and exculpatory evidence. Again, the forum is not persuaded that the
19 discovery sought is relevant or likely to lead to the discovery of evidence relevant to the
20 issue of whether Respondent committed the violations set forth in the NOI's. Even if the
21 Respondent succeeded in proving its affirmative defense(s), achieving such a result
22 would not entitle it to a judgment as a matter of law. Therefore, Respondent's motion to
23 compel production of discovery response to RFP Nos. 57 and 58 is **DENIED**.
24
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1 e. *Documents Related to Issues Regarding the Agency's Prosecution of Case*
 2 *Nos. 88-18, 90-18, and 91-18*

3 The RFPs at issue include:

4 **"REQUEST NO. 61:** For the period 2015 to the present, all documents or
 5 communications with regard to complaints of employers or their legal
 6 counsel regarding Administrative Prosecutors or investigations of
 7 Administrative Prosecutors, including but not limited to Adriana Ortega,
 regarding their use of subpoenas and accompanying correspondence to
 interview recipients of subpoenas in advance of a hearing regarding the
 witnesses' testimony at an upcoming hearing.

8 **"REQUEST NO. 63:** For the period 2015 to the present, all documents,
 9 including internal memoranda, advising the Administrative Prosecutors to
 use and/or refrain from using subpoenas and accompanying
 correspondence to interview witnesses in advance of the hearing.

10 **"REQUEST NO. 64:** For the period 2015 to the present, all documents
 11 regarding disciplinary action taken against Administrative Prosecutors,
 12 including Adriana Ortega, with respect to use of a subpoena and
 accompanying letter to interview witnesses in advance of a hearing.

13 **"REQUEST NO. 65:** For the period 2015 to the present, documents
 14 showing that BOLI Administrative Prosecutors have issued Subpoenas Ad
 15 Testificandum similar to the subpoena issued by Administrative
 16 Prosecutor Adriana Ortega on September 12, 2019 (a copy of which is
 17 attached hereto as Attachment A) and letters accompanying the
 18 subpoenas directing that the recipients of the subpoenas contact the
 Administrative Prosecutor to schedule a time to talk and discuss
 witnesses' testimony in advance of the upcoming hearing similar to the
 letter from Adriana Ortega dated September 12, 2019 (a copy of which is
 attached hereto as Attachment B).

19 **"REQUEST NO. 66:** For the period 2015 to the present, documents
 20 showing that BOLI Administrative Prosecutors, following issuance of
 21 Subpoenas Ad Testificandum, seeking to interview witnesses in advance
 of hearings have:

- 22 a. Prepared memos, notes, or other documents summarizing the
 witnesses' testimony;
- 23 b. Based upon Administrative Prosecutors' interviews of witnesses
 24 in advance of the hearings have made a decision to withdraw the
 subpoena directed to the witness."

25 (*Resp. Second Mot. to Comp.*, pp. 16-17)

Respondent offers the same or similar arguments previously considered and rejected by the forum. The forum is not persuaded that procedural issues that arose during a previous prosecution of cases that were dismissed without prejudice have occurred in the present case or have affected the present prosecution to such a degree as to make the discovery sought relevant. Therefore, Respondent's second motion to compel production of discovery responsive to RFP Nos. 61, 63, 64, 65, and 66 is **DENIED**.

f. Documents Regarding Meal and Rest Periods and Assessment of Penalties

Respondent's RFP No. 80 seeks documents of a former BOLI Commissioner regarding meal and rest periods and assessment of penalties.

"REQUEST NO. 80: All documents or communications from or to former BOLI Commissioner Avakian regarding meal period rules during the following time periods:

- a. During the period that Mr. Avakian served as BOLI Commissioner;
- b. During the period following Mr. Avakian's tenure as BOLI Commissioner to the present."

(Resp. Second Mot. to Comp., p. 20)

The forum is not persuaded that the discovery sought is relevant or likely to lead to the discovery of relevant evidence. Therefore, Respondent's second motion to compel production of discovery responsive to RFP No. 80 is **DENIED**.

g. Penalties Collected by BOLI

Respondent seeks documents relating to how BOLI has "applied, used, disbursed, or retained" penalties collected pursuant to ORS 653.256(4)(a), (b), and (c).

"Respondent's RFP Nos. 73 and 74 seek, in part, all documents that show, demonstrate, or reveal how the penalty sums that were collected in

1 Case No. 29-17 and Case No. 66-17 and were applied, used, or disbursed
2 by the Agency pursuant to ORS 183.745 and ORS 653.256(4)(a), (b), and
3 (c). The Agency collected fines of \$276,680 in Case No. 29-17 from
4 Legacy Emanuel and \$85,000 in Case No. 66-17 from Legacy Silverton.

5 “RFP Nos. 75, 76, 77, 78 and 79 seek documents regarding the receipt,
6 deposit, transfer, use, disbursement, or disposition of any civil penalties
7 paid to BOLI for the period 2011 to the present as a result of enforcement
8 of Oregon wage laws, including payment of funds to the Department of
9 State Lands for the benefit of the Common School Fund, payment of funds
10 to Human Services, retention of funds by the Agency, and the failure to
11 forward funds to either the Department of State Lands or the Department
12 of Human Services.”

13 (*Resp. Second. Mot. to Compel*, p. 22)

14 Respondent argues that how BOLI has treated penalties and revenues obtained
15 from fines will demonstrate a bad faith motive on the part of the Agency. Respondent
16 points to the Supreme Court’s ruling in *Timbs v. Indiana*, 139 S.Ct. 682, 201 L. Ed. 2d
17 1049 (2019), in which the Supreme Court found a state’s forfeiture of a defendant’s
18 vehicle used to transport illegal drugs that was valued four times the maximum
19 monetary fine assessable for the crime the defendant was convicted of was grossly
20 disproportionate and, therefore, unconstitutional under the Eighth Amendment’s
21 Excessive Fines Clause.

22 Respondent also points to the Ninth Circuit’s ruling in *Wakefield v. ViSalus, Inc.*,
23 51 F. 4th 1109 (9th Cir. Oct. 20, 2022) in which the court found that due process may
24 limit aggregated statutory damages when the damages are “gravely disproportionate to
25 and unreasonably related to the legal violation committed.”

26 In addition to the arguments previously offered to and rejected by the forum,
27 Respondent also directs the forum’s attention to the language used by the Court of
28 Appeals of Oregon in *Klein v. Or. Bureau of Labor & Indus.*, 317 Or App 138, 163

(2022). In *Klein*, the Court of Appeals, in reviewing an award of noneconomic damages and conduct of the Administrative Prosecutor, discussed in part:

* * *given the agency's structure, that the prosecutor took that position, and the commissioner did not disavow it, gives rise to at least a 'slight suspicion' that the position is one shared by the agency, including its head and final adjudicator, the commissioner. * * * that specter of non- neutrality materializes into the affirmative conclusion that BOLI at least subtly departed from principles of neutrality when it awarded noneconomic damages * * *

The court, in discussing the propriety of the noneconomic damages awarded, found:

[T]he prosecutor's closing argument apparently equating the Kleins' religious beliefs with 'prejudice,' together with the agency's reasoning for imposing damages in connection with Aaron's quotation of Leviticus, reflect that the agency acted in a way that passed judgment on the Kleins' religious beliefs, something that is impermissible under Masterpiece Cakeshop."

Klein, 317 Or App 138, 161.

Respondent argues that its discovery requests are directly related to its affirmative defenses and are, therefore, within the scope of discovery. The defenses, as set forth by Respondent in its Answer, as well as its discovery motions, are not ones, that if proven, would result in a judgment as a matter of law. Further, the cases cited by the Respondent do not directly address the issue of whether the Agency has the authority to impose civil penalties in cases where a Respondent has been found to have violated the state's wage and hour laws. Respondent has failed to show how the discovery sought could lead to evidence relevant to the issues before the forum, namely whether Respondent committed the violations set forth in the NOI's. Therefore, Respondent's second motion compel production of discovery responsive to its RFP Nos. 75-81 is **DENIED**.

1
2 **RESPONDENT'S REQUEST FOR LEAVE TO FILE MOTIONS AFTER THE DISCOVERY**
3 **MOTIONS DEADLINE**

4 Respondent's motion requested the forum set a date certain for the Agency to
5 produce documents responsive to the discovery requests addressed above. In the
6 alternative, the Respondent "seeks leave to file this motion to compel after the
7 November 11, 2022, discovery motions deadline and after the Agency has served its
8 response to Respondent's Third Request for Production." (*Resp. Second Mot. to*
9 *Comp.*, p. 4). Given that the Respondent filed essentially the same discovery motion
10 twice, the forum is not inclined to extend the deadline for filing discovery motions.
11 Therefore, the Respondent's motion for leave to file discovery motions after the
12 discovery motions deadline is **DENIED**.

13 **IT IS SO ORDERED.**

14 Entered at Portland, Oregon, with copies emailed to:

15 Adam Jeffries (adam.jeffries@boli.oregon.gov), Chief Administrative Prosecutor, 1045 State
16 Office Building, 800 NE Oregon Street, Portland, OR 97232-2180

17 Paula A. Barran (pbarran@barran.com) and Richard Hunt (rhunt@barran.com) , Barran Liebman
18 LLP, 601 SW 2nd Ave Ste 2300, Portland OR 97204

19 Dated: November 30, 2022

20 /s/ Caroline A. Holien
21 Caroline A. Holien, Administrative Law Judge
22 Bureau of Labor and Industries
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24
25